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Workmen's Compensation - Injuries Arising out of Employment - Whether Death of Employee is Compensable When Caused by Felonious Act Directed agaisnt a Third Party

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WORKMEN'S COMPENSATION—INJURIES ARISING OUT OF EMPLOYMENT—WHETHER DEATH OF EMPLOYEE IS COMPENSABLE WHEN CAUSED BY FELONIOUS ACT DIRECTED AGAINST A THIRD PARTY—A decision which will have great impact on employers operating under the Illinois Workmen's Compensation Act[1] was recently handed down in the case of *C. A. Dunham Company* v. *Industrial Commission*.[2] In that case the employee, while on company business was killed when the airplane on which he was a passenger exploded and crashed. The explosion was caused by a bomb put on board the plane to carry out a man's plot to kill his mother.[3] A surviving daughter of the employee filed a death benefit claim with the Industrial Commission. The Commission granted an award, but on review the circuit court set aside the award on the ground that her father's death did not meet the statutory requirement that the death or injury must "arise out of" his employment.[4] The Supreme Court of Illinois, on direct review, reversed the judgment of the circuit court and confirmed the award when it concluded that that prerequisite to recovery was satisfied.

The decision in the instant case depends solely on the interpretation of the words "arising out of" the employment. This initially empty phrase has engendered much controversy in the application of workmen's compensation laws.[5] In the early days of these acts, many of the courts, in an attempt to define the expression, seem to have been hampered by their inability to free their interpretations from common law influences. Thus, this condition of coverage by the acts became entangled with the tort principles of fault, foreseeability and proximate cause; while at the same time the social reasons for the legislation were afforded little recognition.[6]

[1] Ill. Rev. Stat. 1957, Vol. 1, Ch. 48, § 138.1 et seq.

[2] 16 Ill. (2d) 102, 156 N. E. (2d) 560 (1959).

[3] The instant case was a by-product of a scheme formulated by one Graham to collect on his mother's insurance and to inherit her property by murdering her. For this purpose, he planted a bomb in her baggage which exploded shortly after the takeoff of an airplane in which she was riding, killing her and all others aboard the craft. He was subsequently convicted and executed for the murders so committed.

[4] The death or injury must "arise out of" the employment, and the employee must be "in the course of" his employment: Ill. Rev. Stat. 1957, Vol. 1, Ch. 48, § 138.1. It was stipulated in the case that the decedent was "in the course of" his employment, but both phrases must be independently satisfied in Illinois to support a recovery: Loyola University v. Industrial Commission, 408 Ill. 139, 96 N. E. (2d) 509 (1951); Scholl v. Industrial Commission, 366 Ill. 588, 10 N. E. (2d) 360, 112 A. L. R. 1254 (1937). For a list of other jurisdictions following this principle, see 99 C. J. S., Workmen's Compensation, § 208, p. 674, note 35.

[5] Compare Cardillo v. Liberty Mutual Insurance Co., 330 U. S. 469, 67 S. Ct. 801, 91 L. Ed. 1028 (1947), with Horovitz, "The Litigious Phrase: 'Arising out of' Employment," 3 NACCA L. J. 15 (1949).

[6] Larson, Workmen's Compensation Law (Matthew Bender & Co., New York, 1952), § 6.50. See also Horovitz, "The Litigious Phrase: 'Arising out of' Employment," 3 NACCA L. J. 15 (1949), particularly note 5.

"Arising out of" the employment has reference to the causal connection between the injury or death and the employment.[7] Over the years the courts have formulated several tests of this causal relation. One of the earliest was the "proximate cause" test which was applied in *Madden's Case*.[8] There recovery was allowed for an aggravated heart condition only after the court concluded that there was a direct causal connection between the injury and the claimant's work of dragging floor carpets. Another test which achieved some currency was the "common hazard" test framed in the dicta of *McNichol's Case*.[9] There it was stated that "the causative danger must be peculiar to the work and not common to the neighborhood." Under this criterion, a travelling salesman could not recover compensation for an injury resulting from a traffic mishap, for such a risk would be common to the public.[10]

Modern tribunals appear to have recognized that the fundamental purpose of the workmen's compensation acts was being defeated by judicial constriction of the meaning of the several legislatures, so many of the later cases have taken a more liberal view of these statutes. This broadened outlook has produced such yardsticks as the "increased risk,"[11] the "actual risk,"[12] and the "positional" or "but for" test.[13] The most liberal of these, one which most courts have refused to adopt, is the latter.[14] Under it, the question asked is whether the injury or death would have occurred but for the fact that the conditions and obligations of the employment placed the employee in the position where he was injured. The only type of injury excluded from this test would seem to be the one inflicted by another employee when motivated by personal vengeance.[15]

[7] Angerstein, Illinois Workmen's Compensation (Burdette, Smith Co., Chicago, 1952), § 392; Reisenfeld, "Forty Years of American Workmen's Compensation," 35 Minn. L. Rev. 525 (1951).

[8] 222 Mass. 487, 111 N. E. 379 (1916).

[9] 215 Mass. 497, 102 N. E. 697 (1913).

[10] Hewitt v. Casualty Co. of America, 225 Mass. 1, 113 N. E. 572, L. R. A. 1917B 249 (1916).

[11] Martin v. V. J. Lovibond & Sons, [1914] 2 K. B. 227; City of Chicago v. Industrial Commission, 389 Ill. 592, 60 N. E. (2d) 212 (1945).

[12] The leading case applying this test is that of Hughes v. St. Patrick's Cathedral, 245 N. Y. 201, 156 N. E. 665 (1927). The claimant there suffered heat prostration while working in a cemetery. The New York Court of Appeals said: "Although the risk be common to all who are exposed to the sun's rays on a hot day, the question is whether the employment exposes the employee to the risk."

[13] Truck Ins. Exchange v. Industrial Accident Commission, 147 Cal. App. (2d) 460, 305 P. (2d) 55 (1957); Baran's Case, 336 Mass. 342, 145 N. E. (2d) 726 (1957); Howard v. Harwood's Restaurant, 25 N. J. 72, 135 A. (2d) 161 (1957); Gargiulo v. Gargiulo, 13 N. J. 8, 97 A. (2d) 593 (1953).

[14] Larson, op. cit., § 6.40, note 6.

[15] See Malone, "Workmen's Compensation," 8 Rutgers L. R. 97 (1953); Howard v. Harwood's Restaurant, 25 N. J. 72, 135 A. (2d) 161 (1957).

The rationale of the instant case fits none of these tests well. The courts of Illinois formerly insisted that the quantity or degree of the risk from which the employee sustained the injury must have been increased as to him, as distinct from the risk to the general public, before such injury would be compensable. That, in substance, is the "increased risk" test.[16] So, the court's ability to allow recovery in this case would seem to be circumscribed by precedent. Nevertheless, a decision was reached for the claimant by labelling the cause of the employee's death a "risk of transportation." It reasonably follows that, as the employee's work required him to travel, he was exposed to the risks of transportation to a greater degree than the general public. Consequently, his injury satisfies the "arising out of" requirement of the statute. It is clear that the validity of this logic depends upon the validity of the premise. Calling the explosion of a bomb a transportation risk because it occurred on an airplane implies that such an explosion is not as likely to happen in other activities; but it was stipulated by the parties that an incident such as this had happened only once before in the history of aviation. It must be considered that the court viewed the cause of the employee's death to be the explosion *and crash* of the airplane. The distinction between the explosion and the crash perhaps can be criticized as dubious, but the court held it valid and sufficient. If the cause was the explosion of the bomb placed on board the plane, then the premise seems invalid. On the other had, an airplane crash is indeed a "risk of transportation."

A typical difficulty in the court's path was the case of *Borgeson* v. *Industrial Commission.*[17] In that case, a salesman was injured when hit by a stray bullet while on the street in the course of his employment. Compensation was denied on the grounds that the injury did not result from a risk of the work. In overruling the denial, the court stated that when a man is required by his work to travel the streets, they become the milieu of his work and he is exposed to all street hazards to a greater degree than the general public. But one wonders what the result would be if a secretary were hit by a stray bullet while sitting at her desk on the third floor of a building.[18] It logically follows that she would be denied compensation because her job had not required her to be on the street at the time of her injury, and her exposure to such risks was not thereby increased over that of the general public. On the other hand, if the "positional" or "but-for" test were applied to such a situation, the solution is far less difficult.

[16] Payne and Dolan v. Industrial Commission, 382 Ill. 177, 46 N. E. (2d) 925 (1945).

[17] 368 Ill. 188, 13 N. E. (2d) 164 (1938).

[18] Larson, op. cit., § 10.11, note 6.

The workmen's compensation acts are rooted in principles of social morality and distributive justice. The enactment of these laws in the early part of this century was a result of the unconscionable social conditions produced by the development of industry. Thousands of workers annually were prevented from supporting themselves and their families due to industrial accidents. Recoveries at law by injured workmen were rare because of the common law defenses of contributory negligence, assumption of risk, and the fellow-servant rule. Thus, these victims of industrial expansion were left remediless. To ameliorate this condition the acts gave compensation to those incapacitated by work-connected injuries; the cost was passed on to the consumers of the products and services of industry.[19] Reflection on the underlying policy of the legislation puts to scorn the judicial limitations on recovery by needy and worthy claimants. Equally illogical is the reiteration of such limitations while they are in fact surpassed. Although the "increased risk" test has not been discarded, the instant case appears to have stretched it beyond recognition in Illinois. The courts in the future should take the opportunity which the present holding affords to establish a broader and clearer criterion in harmony with the objectives of the Workmen's Compensation Act.

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[19] For a thoughtful discussion of this social policy, see Larson, op. cit., § 2.20; 99 C. J. S., Workmen's Compensation, § 5, p. 36; 58 Am. Jur., Workmen's Compensation, § 2, p. 575.